

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.

RSA No.2297 of 1982

Date of Decision: 27.8.2008

Yash Pal Singh

.....Appellant

Vs.

Raj Pal Singh and others

....Respondents

....

CORAM : HON'BLE MR.JUSTICE RAJIVE BHALLA

Present : Mr.Gurpreet Giani, Advocate for the appellant.

....

RAJIVE BHALLA, J (Oral)

The plaintiff/appellant, lays challenge to the judgement and decree,dated 12.10.1982 passed by the Additional District Judge, Jalandhar, accepting the appeal filed by the respondents, reversing the judgement and decree dated 26.8.1981, passed by the Sub-Judge, Ist Class, Jalandhar and as a consequence dismissing the appellant's suit for possession of H.No.WB-150, Ali Mohalla, Bazar Sheikhan, Jalandhar.

Before dealing with the substantial questions of law, it would be appropriate to briefly narrate the facts of the present case.

One Sain Dass was owner in possession of H.No.WB-150, Ali Mohalla, Bazar Sheikhan, Jalandhar. He passed away on 26.7.1979 and was survived by his widow Kesra Devi defendant no.4 and three sons, Yash Pal, the appellant, Rajpal Singh and Rajinder Pal Singh, respondents no.1 and 2 and a daughter Shakuntala Devi-respondent no.3. After the demise of Sain Dass, a dispute arose between his sons as to ownership of

the aforementioned property. The appellant filed a suit for declaration and for possession of a part of the house in possession of respondents no.1 and 2 by alleging that before his demise Sain Dass, had executed a registered will dated 5.9.1977 bequeathing the suit property, to him alone. Respondents no.1 and 2, denied the due execution of the Will and in turn set up another will dated 11.4.1979 Ex.D-1, bequeathing the suit property to them alone. Their mother, who was arrayed as defendant no.4, filed a written statement, accepting the correctness of the Will dated 5.9.1977, set up by the appellant. Respondent no.3, their sister, filed an affidavit before the trial Court refusing to take sides but stated that in case the property was to devolve upon natural heirs, her share should be granted to her mother. Upon an appraisal of the pleadings, the Sub Judge, Ist Class, Jalandhar, framed the following issues :-

- “1. Whether the plaintiff is entitled for possession of a portion of house no.150 WB as alleged in the head note of the plaint ? O.P.P
2. Whether the registered will dated 5.9.77 in favour of the plaintiff is valid and binding on the parties ? O.P.P.
3. Whether the will dated 11.4.79 in favour of defendant Rajpal Singh and Rajinder Pal Singh is valid and binding on the parties ? O.P.P.
4. Whether the suit is properly valued for the purposes of Court fee and jurisdiction ? O.P.P.
5. Relief.”

The trial Court decreed the suit by recording a finding that the

Will dated 5.9.1977 Ex.P-1, was proved by the appellant to be the last valid Will of the deceased. As regards the Will propounded by respondents no.1 and 2 dated 11.4.1979 Ex.D-1, it was discarded as it was held to be shrouded by suspicious circumstances.

Aggrieved by the aforementioned judgement and decree, respondent no.1 filed an appeal. Vide judgement and decree dated 12.10.1982, the Additional District Judge, Jalandhar, accepted the appeal, reversed the judgement and decree passed by the trial Court and dismissed the suit. The first appellate Court rejected both Wills and held that the estate of Sain Dass would devolve upon all his natural heirs, in equal shares.

Counsel for the appellant submits that the first appellate Court, ignored relevant pleadings, material evidence and disregarded the principles that govern the proof of a Will. The first appellate Court relied upon inconsequential circumstances, to hold that the Will Ex. P-1 was shrouded by suspicious circumstances. The first appellate Court held that the presence of the appellant, during the execution of the will, though denied, was sufficient to hold that the appellant took a prominent part in bringing the Will, Ex P-1 into existence. It is submitted that no such averment appears in the written statement nor was any material adduced in evidence to suggest that the appellant took an active part in the execution of the Will. The grounds of appeal filed before the first appellate Court, do not raise any such plea. Furthermore, when the appellant stepped into the witness box as PW-3, he was not cross-examined as to his presence during the execution of the Will or that by his presence, he exercised any undue influence. It is further submitted that even if it were to be presumed

that the appellant was present during the execution of the Will, his mere presence alone, would not be sufficient to draw an inference of undue influence or coercion. Undue influence assumes the exercise of such influence being brought to bear upon the testator, as has interfered with the testator's voluntary exercise of his discretion. Reliance for the above arguments that mere participation or presence of a beneficiary or the propounder of a Will, at its execution would not necessarily give rise to a necessary inference of undue influence, is placed upon judgements of the Hon'ble Supreme Court reported as **Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta**, AIR 1955 SC 363 and **Pentakota Satyanarayana and others V. Pentakota Seetharatnam and others**, AIR 2005 SC 4362.

Another argument pressed into service, by counsel for the appellant, is that the first appellate Court's findings that the Will is unnatural, as no provision was made, by the testator for his widow, is perverse, incorrect and is recorded by ignoring and disregarding the written statement filed by Smt.Kesra Devi widow of the deceased and mother of the parties. Smt.Kesra Devi defendant no.4 filed a written statement, admitting the correctness of the Will Ex.P-1 and specifically averred that the Will was executed by her late husband in favour of the appellant, as respondents no.1 and 2 did not look after or respect him and, therefore, she had no objection to the Will. It is submitted that these significant admissions in the written statement filed by Smt. Kesra Devi were ignored. It is further argued that the appellate Court, failed to satisfactorily deal with the fact that on 15.12.1965, the testator brought out an advertisement, in a daily newspaper, disinheriting respondent no.1

Raj Pal Singh. This fact, though, not denied by the respondents, whether in their written statement or in their deposition before the trial Court has not been assigned its due significance.

It is further argued that disposition of property by way a Will more often than not reflects a testator's desire to disrupt the natural course of succession. The mere fact that other natural heirs have been disinherited or ignored, cannot by itself, be a circumstance, to discard a Will. A testator, is free to direct the devolution of his self acquired property, after his demise, to any person, whether a relative or a stranger. In case the propounder of the Will satisfies the Court about its due execution and dispels any suspicious circumstances that may surround its execution, such a testamentary disposition cannot be set aside on the ground that natural heirs have been disinherited or ignored.

It is next submitted that as the appellant has established the due execution of the Will by producing the attesting witnesses PW 1 Gurbachan Lal, by identifying the handwriting of the scribe by the deposition of DW-2. nothing more was required of the appellant. The so called suspicious circumstances, namely; the exclusion of all other legal heirs and the alleged presence of the appellant, at the time of execution of the Will, having been satisfactorily explained, the onus, thereafter, to establish the assertions putforth in the written statement, namely; that the Will had been obtained by undue influence and coercion, shifted to respondents no.1 and 2. To discharge this onus, the respondents have not lead any evidence, much less cogent evidence. The first appellate Court, disregarded the established principles of law, regarding appreciation of evidence, mode of proof of Will, the onus to discharge suspicious

circumstances and if so discharged, the onus to establish fraud, coercion or undue influence by the party alleging them. It is, therefore, prayed that as the impugned judgement discloses serious infractions of law, giving rise to substantial questions of law, the appeal be accepted, the judgement and decree passed by the first appellate Court be set aside and that of the trial Court be restored.

I have heard learned counsel for the appellant and perused the judgement of the trial Court, as also the judgement passed by the appellate Court.

Counsel for the appellant has framed the following questions of law :

- (i) Whether the judgement and decree passed by the first appellate Court, is perverse and illegal as the first appellate Court failed to consider material pleadings, ignored material evidence and recorded findings that have no basis whether in the pleadings or in the evidence .
- (ii) Whether in view of the written statement filed by defendant no.4, the first appellate Court could have held that the failure of the testator to provide any property to or maintenance for his widow, defendant no.4 was a suspicious circumstance that would cast a shadow on the due execution of the Will Ex.P-1.
- (iii) Whether the mere presence of a beneficiary at the place of execution of the Will is sufficient, to draw an inference of undue influence, being brought to bear

over the free will of the testator.

A judicial opinion recorded without referring to or considering all relevant pleadings and evidence would necessarily be susceptible to the charge of perversity and illegality. The proof of the execution of a Will, is primarily a question of fact, where however, a Court while considering the execution and proof of a Will, discards the Will on irrelevant and illegal considerations, ignores relevant pleadings and evidence, such an opinion would necessarily be erroneous in law and, therefore, would give rise to a substantial question of law, requiring interference in second appeal.

Before proceeding to answer the questions of law as framed by counsel for the appellant, it would be necessary to briefly refer to the nature of a Will, statutory provisions and relevant precedents, that govern the execution and the proof of Wills.

A Will, is defined under Section 2(h) of the Indian Succession Act to mean the legal declaration of the intention of a testator with respect to his property, which he desires to be carried into effect after his death and is, therefore, an expression of the testator's desire to chart out the future course of his estate. Section 59 of the Indian Succession Act, prescribes that every person of sound mind not being a minor, may dispose of his property by a Will. Section 63 of Indian Succession Act provides that every testator, not being a soldier employed in an expedition or engaged in actual warfare etc. shall execute his Will by affixing his signatures or a mark in the Will or the Will shall be signed by some other person in his presence and by his direction. The Will shall thereafter be attested by two and more witnesses, each of whom has seen the testator

signing or affixing his mark to the Will or as has seen some other person signing the Will, in the presence and by the direction of the testator. Each of these witnesses is required to sign the Will in the presence of a testator. Section 63(c) however, prescribes that it shall not be necessary that more than one witness be present at the same time and it does not prescribe any particular form of attestation. A Will so executed, may if the testator so desires be registered under the Indian Registration Act with the Registrar/Sub-Registrar concerned.

The execution of a Will shall be proved in accordance with the provisions of Section.68 of the Indian Evidence Act. A basic and fundamental principle of evidence postulates that the onus to establish the execution of a document lies upon the person, who propounds it. Section 67 provides that if a document is signed by a particular individual, the signature must be proved to be in his handwriting. As referred to herein above, Section 63 of the Indian Succession Act, requires a Will to be attested by at least two witnesses. Section 68 of the Evidence Act enacts a mandate that a document required by law to be attested, shall not be used as evidence until one attesting witness, at least, has been called to prove its execution. A Will, therefore, must be proved by producing at least one attesting witness. The onus, therefore, to prove the due execution of a Will, lies upon its propounder as does the onus to dispel any suspicious circumstances that may surround the execution of a Will. In order to fortify the above conclusion, it would be appropriate to reproduce paras 18, 19, 20 and 22 of the judgement of the Hon'ble Supreme Court reported as **H. Venkatachala Iyengar, v. B.N. Thimmajamma and others, AIR 1959 SUPREME COURT 443**, that place in perspective the law with

respect to execution and proof of Wills :

“(18). What is the true legal position in the matter of proof of wills ? It is well known that the proof of wills presents a recurring topic for decision in Courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68, Evidence Act are relevant for this purpose. Under S. 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Ss. 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Ss. 59 and 63 of the Indian Succession Act are also

relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will ? Did he understand the nature and effect of the dispositions in the will ? Did he put his signature to the will knowing what it contained ? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribe by S. 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with

mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

(19). However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of the

propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

(20) There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the

exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

(22). It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Parcq in *Harmes v. Hinkson*, 50 Cal W N 895 : (A I R 1946 P C 156) "where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not

an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth," It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect."

A relevant extract from **Pentakota Satyanarayana and others**

V. Pentakota Seetharatnam and others, AIR 2005 SC 4362 would also be appropriate :-

(25) In the instant case, the propounders were called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document on his own freewill. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts indicated above

.....XXXXXX.....XXXXXX.....XXXXXX

In our opinion, the burden of proof to prove the Will has been duly and satisfactorily discharged by the appellants. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the Will

in the manner contemplated by law. In such circumstances, the onus shifts to the contestant opposing the Will to bring material on record meeting such prima facie case in which event the onus shifts back on the propounder to satisfy the Court affirmatively that the testator did know well the contents of the Will and in sound disposing capacity executed the same.

XXXXXXXX.....XXXXX.....XXXXXXXX.....

It is, therefore, apparent that once the Will is proved, to have been executed by the testator in accordance with the rules of evidence set out in Sections 67 and 68 of the Indian Evidence Act and all suspicious circumstances have been dispelled the propounder thereof would be entitled to a declaration that the Will is the validly executed Will of the deceased testator. The onus, thereafter, to establish otherwise or to establish that the Will was obtained by coercion, undue influence or fraud or by any other circumstance, shifts to the party alleging such undue influence, coercion or fraud. For the latter conclusion, reference may be made to **Niranjan Umeshchandra Joshi V. Mrudula Jyoti Rao and others**, (2006) 13, SCC 433 a relevant extract whereof reads as follows :-

“The burden of proof that the will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the will and that he had put his signature out of his own free will having a sound

disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator.”

The above judgement has been reiterated in a judgement of the Hon’ble Supreme Court in **Savithri and others V. Karthyayani Amma and others**, AIR 2008 SC 300.

It is therefore beyond cavil that

- (1)the onus to establish the due execution of the Will in accordance with Sections 67 and 68 of the Indian Evidence Act lies upon the propounder thereof
- (2)the propounder of a Will would be required to establish that the Will was signed by the testator and the witnesses in accordance with the procedure prescribed under Section 63 of the Indian Succession Act.
- (3)The propounder would be required to establish that at the relevant time the testator was in sound

disposing mind and understood the nature and affect of the proposed disposition and affixed his signature or mark of his own free will.

(4)the propounder would be required to satisfactorily dispel all suspicious circumstances surrounding the execution of the Will.

(5)Once the propounder of the Will discharges the above onus, the onus to establish the defense set up would necessarily shift to the person, who alleges it and where it is alleged that that the Will has been procured by exercise of undue influence, fraud or coercion, the onus to establish these facts would lie upon the party that alleges so.”

After having set out the nature of a Will, the mode and manner of its proof and the nature of the shifting onus, it would be appropriate to proceed to examine the impugned judgement in the light of the questions of law framed by counsel for the appellant.

The trial Court, held that the appellant had,in the discharge of the onus placed upon him, successfully established the due execution of the Will Ex.P-1 by not only proving the execution of the Will but also dispelling any suspicion as to its execution. On the other hand the will Ex. D-1, set up by respondent No.1 and 2, was held to be invalid as it was surrounded by suspicious circumstances.

Respondents No. 1 and 2 filed an appeal. The memorandum of appeal filed by them makes interesting reading. The respondents did not raise any ground to challenge the findings recorded by the trial Court,

upholding the execution of the Will Ex. P-1. Disregarding the absence of any challenge to the Will Ex.P-1, the first appellate court proceeded to adjudicate the validity of the Will Ex.P-1. The first appellate Court, held that the Will was unnatural, as the testator had disinherited his widow and other natural heirs without any cogent reason. It also held that as DW-1, an attesting witness, had admitted the appellant's presence during the preparation and execution of the Will, an inference would arise of the exercise of undue influence by the appellant. The Will Ex.P-1 was, therefore, discarded as was the Will Ex.D-1 and it was held that natural succession would open.

The First appellate court's judgement discloses an abject failure, on its part to peruse material pleadings and evidence, appreciate the evidence correctly, to adhere to the principles of law that govern the proof of a Will, to comprehend that the mere presence of a beneficiary or the absence of disposition of property to natural heirs are by themselves, circumstances insufficient to discard a Will and that the memorandum of appeal filed by the respondents did not impugn the findings recorded by the trial Court, with respect to the execution and the proof of the Will Ex.P-1.

As referred to herein above, the first appellate Court held that the Will Ex. P-1, is a suspicious document as the appellant failed to satisfactorily explain the testator's bequest to the appellant alone, by ignoring his wife thus, leaving her to the appellant's mercy. While returning this finding, the first appellate Court, in its apparent zeal to discard the Will Ex. P-1, over looked a significant fact, that the testator's widow Smt.Kesra Devi, had filed a written statement, unequivocally

accepting the correctness of the Will Ex.P-1 and the disposition of property made therein thus asserting a positive stand that she had no grievance with the fact that no provision had been made for her in the Will. The written statement further spells out the reasons that compelled Sh.Sain Dass to disinherit respondents no.1 and 2 and nominate the appellant as his sole heir. Para 12 of her written statement, would require reproduction, so as to place the above conclusions in their correct perspective :

“That the plaintiff served his father, Shri Sain Dass and defendant no.4 like an affectionate and obedient son of parents, while the other sons, i.e. defendant no.1 and 2 were not in good terms with Shri Sain Dass and defendant No.4. Defendant no.1 and 2 never cared for their father in his life time. The father of the plaintiff had a natural love and affection towards the plaintiff and out of this love and affection the father of the plaintiff, who was in a sound disposing mind, made a will dated 5.9.1977, in favour of the plaintiff, nominating the plaintiff, his only heir and successor, to house no.WB-150, Ali Mohalla, Bazar Sheikhan, Jullundur, to succeed after his death. There is no other Will, made by Sh.Sain Dass, father of the plaintiff, in favour of any person, except the will dated 5.9.1977, made in favour of the plaintiff. Only Yash Pal, plaintiff has been taking care of defendant no.4 as earlier. Other

sons, defendant no.1 and 2 were all along hostile, cruel and dis-respectful towards their father and defendant no.4. Defendant No.4 has no objection, if the suit of the plaintiff is decreed.”

The above paragraph of the written statement filed by Smt.Kesra Devi, discloses an unequivocal acceptance of the execution of the Will Ex. P-1, by her husband and a positive averment that the Will Ex. P-1 was executed by Sh.Sain Dass, bequeathing his house to the appellant. The written statement narrates that the testator excluded respondent nos.1 and 2 from his property, as they were hostile, cruel and disrespectful towards their father and nominate the appellant as his sole successor, as he served his father and mother. The impugned judgement unfortunately does not make any reference to the written statement filed by Smt.Kesra Devi by either adverting to it or considering it.

A Will is a testamentary document, executed during the life time of a testator, expressing his desire, as to the mode and manner in which his property would devolve, after his demise. More often than not, a Will reflects a desire to disrupt the normal course of succession prescribed under the Hindu Succession Act and other similar enactments applicable to other religious denominations. A Will may therefore confer rights upon strangers to the immediate family of the deceased and divest immediate members of his family of rights that may have come to them but for the intervention of a testamentary devolution of property by way of a Will. A Will, therefore, is a document that, more often than not, disrupts the normal course of succession, as prescribed

under the Hindu Succession Act and such other statutes, customs or conventions that govern the disposition of property. Depriving a legal heir or some of them of rights in property that may have devolved upon them but for the testamentary succession cannot by itself, in the absence of any other supporting circumstances, be the sole circumstance to hold that a Will is a suspicious document. Rights in and over property are personal to an individual and may be disposed of in such manner, as may be deemed appropriate. The consistent view expressed by judicial precedent that depriving natural heirs of property that may have devolved upon them, but for testamentary disposition would not by itself be a circumstance to hold that a Will is suspicious. Any other conclusion would at variance with the very purpose of the execution of a Will and the nature of private property.

It is true that while executing the Will the testator did not make any arrangement for his widow and also disinherited respondents no.1 and 2. The material on record, however, suggests that respondents no.1 and 2 were disinherited by their father for valid reasons. The reasons for their disinheritance are not far to seek and find voice in the Will Ex P-1 and in the written statement filed by their mother. The Will and the written statement, filed by their mother, unequivocally accuse respondents no.1 and 2 of indifference, cruelty and misbehaviour towards their father. The appellant has also produced, in evidence, an advertisement, issued by Sain Dass disowning respondent no.1. The recitals in the Will and the averments in the written statement filed by Smt.Kesra Devi herself should have been sufficient to dispel any suspicion that may have arisen in the mind of the first appellate Court. The first appellate Court,

therefore, fell into error as it failed to consider the averments in the written statement, filed by Smt.Kesra Devi and the recitals in the Will. The first appellate Court failed to appreciate that a Will more often than not disrupts the normal course of succession and, therefore, in the absence of any other material the disposition of property made in favour of the appellant alone could not have been held to be a suspicious circumstance sufficient to discard the execution of the Will. The first and second substantial questions of law are, therefore, answered by holding that the first appellate Court committed an error of jurisdiction by ignoring the written statement filed by defendant no.4 Smt.Kesra Devi, widow of the testator, the recitals in the Will, while recording its opinion that the Will is a suspicious document. As a result the finding, recorded by the first appellate Court, that the Will Ex. P-1 was unnatural and, therefore, could not be accepted as the last valid Will executed by the testator is set aside.

The third question of law arises from a finding recorded by the first appellate Court that as the presence of the appellant was admitted by the attesting witness DW-1, it is sufficient to infer exercise of undue influence, by the appellant so as to bring the Will into existence.

It is true that DW-1, an attesting witness to the Will, admitted during, cross-examination, that the appellant was present during the execution of the Will and paid the fee to the scribe. The onus to dispel any suspicion, as a result of the admission made by DW-1, lay upon the appellant. The question that merits consideration is whether the first appellate Court was justified in holding that the presence of the appellant, during the execution of the Will was sufficient in itself, to hold that the appellant brought to bear such a degree of influence on the testator as led

the testator to alter his proposed disposition of property, to the benefit of the appellant.

The presence of a beneficiary during the preparation and execution of a Will would necessarily raise suspicion. The mere presence, however, of a beneficiary, in the absence of any other evidence or material to suggest undue influence would not by itself raise an inference of the exercise of undue influence. It is not every influence that falls within the mischief of “undue influence”, sufficient to discard a Will but such influence as has altered the testator's proposed disposition of property to the favour of the beneficiary.

It has been held by a long line of binding precedents of this Court, as also of the Hon’ble Supreme Court that the presence of the propounder of the Will or a beneficiary thereunder would arouse suspicion, requiring the Court to proceed to examine the evidence with a greater degree of care and caution but his mere presence, in the absence of any other circumstances, would not lead to a necessary presumption that undue influence has been brought to bear on the free exercise, by the testator, of his volition. A paragraph from a judgement of the Hon’ble Supreme Court in **Naresh Charan Das Gupta V. Paresh Charan Das Gupta**, AIR 1955 S.C. 363, as to the nature of undue influence would place the above conclusion in its correct perspective :-

“It is elementary law that it is not every influence which is brought to bear on a testator that can be characterised as “undue”. It is open to a person to plead his case before the testator and to persuade him to make a disposition in his favour. And if the testator retains his

mental capacity, and there is no element of fraud or coercion – it has often been observed that undue influence may in the last analysis be brought under one or the other of these two categories – the will cannot be attacked on the ground of undue influence. The law was thus stated by Lord Penzance in *Hall V. Hall* (1868) L.R. 1 P & D. 481 at page (C) & 482):

“But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like – these are all legitimate and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgement, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgement, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, but

not driven, and his will must be the offspring of his own volition and not the record of some one else's.”

Another relevant judgement, namely **Pentakota Satyanarayana and others (supra)** would require reference.

“(26). It is settled by a catena of decisions that any and every circumstance is not a suspicious circumstance. Even in a case where active participation and execution of the Will by the propounders/beneficiaries was there, it has been held that that by itself is not sufficient to create any doubt either about the testamentary capacity or the genuineness of the Will. It has been held that the mere presence of the beneficiary at the time of execution would not prove that the beneficiary had taken prominent part in the execution of the Will. This is the view taken by this Court in *Sridevi and Ors. v. Jayaraja Shetty and Ors.*, (2005) 2 SCC 784. In the said case, it has been held that the onus to prove the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will proof of testamentary capacity and the proof of signature of the testator as required by law not be sufficient to discharge

the onus. In case, the person attesting the Will alleges undue influence, fraud or coercion, the onus will be on him to prove the same and that as to what suspicious circumstances which have to be judged in the facts and circumstances of each particular case.

The mere presence of DW4 (appellant no.1) would not make it a suspicious circumstance. Assuming the presence to be true that does not mean undue influence was exercised and mere presence does not mean that a prominent part was played. Hence the Will has been duly proved by the appellants.

It is, therefore, abundantly clear that the mere presence of the propounder of a Will or a beneficiary thereunder during the preparation, execution or registration of a Will, would not lead to an inference of undue influence being brought to bear on the testator to alter his proposed disposition of property in favour of the propounder of a Will or a beneficiary.

The written statement filed by respondents no.1 and 2 does not contain any averment that the appellant was present during the execution of a Will or participated in its preparation, execution and registration. The appellant stepped into the witness box as DW-3. During his cross-examination no question relating to his alleged presence during the execution of the Will was addressed to him. In fact, no question was

addressed that he had procured the Will by exercise of undue influence on the mind of the testator. It is DW-1, the attesting witness of the Will, who stated, during his cross-examination, that the appellant was present during the execution of the Will and paid money to the scribe. In my considered opinion, the statement of DW-1 alone, even if true, is not sufficient to establish that the appellant, by his mere presence, brought to bear such a degree of influence as to alter the testator's true intent with respect to the disposition of his property. It is not mere influence but "undue influence" brought to bear upon the testator, causing him to alter his proposed disposition of property in favour of the appellant, that would lead to discarding of a Will.

The appellate Court, disregarded these fundamental principles of law and held that the presence of the appellant, as admitted by DW-1, a witness to the execution of the Will was sufficient to infer that the appellant dominated the testator at the time of execution of the Will. The appellate Court, while drawing the above inference did not refer to any evidence other than the deposition by DW-1 Yashpal. The first appellate Court disregarded the written statement filed by Smt. Kesra Devi, admitting the due execution of the Will, by her late husband. The respondents, on the other hand, did not produce any evidence, prima facie or conclusive evidence to establish "undue influence" and, therefore, this erroneous inference, drawn by the first appellate Court is necessarily illegal and perverse.

In view of what has been stated herein above, I am satisfied that in the absence of any material or evidence to suggest that the appellant brought to bear any undue influence on the free volition of the testator, the

appellant's mere presence at the time of the preparation and execution of the Will, even if accepted, does not lead to an inference that the Will Ex. P-1 was brought into existence by the appellant by exercising undue influence over the testator.

Another aspect of this case requires mention. The grounds of appeal filed by the respondents, before the first appellate Court do not contain an averment challenging the execution of the Will Ex. P-1 or the findings returned by the trial Court affirming the execution of the Will. The memorandum of appeal merely raises grounds relating to the rejection of the Will Ex.D-1. An appellate Court draws its jurisdiction to adjudicate a dispute, from the grounds raised in the memorandum of appeal. The impugned judgement, therefore, suffers from an error, as the appellate Court failed to peruse the grounds of appeal and failed to discern that the findings returned by the trial Court with respect to the Will Ex.P-1 were not challenged, in the memorandum of appeal filed before it.

Cross-objections No.11-C of 1983

Neither the cross-objectors nor any counsel is present on their behalf. I would, therefore, have dismissed the cross-objections for non prosecution but as the appeal was filed in the year 1982, the cross-objections have been perused on the merits of the pleas raised in the cross-objections. The cross-objections challenge the rejection by the trial Court and the appellate Court of the due execution of the Will Ex.D-1.

The Will Ex.D-1 dated 11.4.1979 is propounded by respondents no.1 and 2 to be the last valid will executed by the testator. Both the trial Court and the first appellate Court have returned concurrent findings of fact that the Will Ex.D-1 was not executed in the presence of

the attesting witnesses Hira Lal and Charan Singh. They admit that they appended their signatures, while sitting in the office of Hira Lal DW-2 and thereafter went to the office of the Sub-Registrar, where the Will was registered. They failed to depose that the Will was signed by Sain Dass in their presence. The procedure for execution/attestation of a Will, prescribed under Section 63 of the Indian Succession Act requires the testator to sign or affix his mark in the presence of the attesting witnesses. These findings of fact do not raise any question, much less a substantial question of law that would require interference in second appeal. Even otherwise, no question of law has been framed in the cross-objections. Dismissed.

In view of the findings recorded herein above, I am satisfied that the judgement rendered by the first appellate Court is illegal and perverse, as it disregards material pleadings, fails to apply the established principle of law relating to discharge of onus for dispelling suspicious circumstances and draws perverse and illegal conclusions from the facts on record.

In view of what has been stated herein above, the appeal is allowed, the cross-objections are dismissed, the judgement and decree passed by the first appellate Court is set aside and the judgement and decree passed by the trial Court is restored.

No order as to costs.

27.8.2008
GS

(RAJIVE BHALLA)
JUDGE

21. Apart from the suspicious circumstances to which we have just referred in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English Courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical Courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word 'conscience' in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the Court is

the last will of the testator, the Court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.